No. 143

In the Supreme Court of the United States

OCTOBER TERM, 1948

ALVIN KRULEWITCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 857–867) is reported at 167 F. 2d 943.

JURISDICTION

The judgment of the Court of Appeals was entered May 11, 1948 (R. 868). On June 9, 1948, by order of Mr. Justice Jackson, the time for filing a petition for a writ of certiorari was extended to July 10, 1948 (R. 869). The petition for a writ of certiorari was filed on July 9, 1948, and was, with the limitation hereinafter indicated, granted on October 11, 1948. The jurisdiction of this Court

is conferred by 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

The order allowing certiorari limits review to the question presented as Question 3 by the petition for a writ of certiorari, to wit:

> It was prejudicial and reversible error for the trial court to receive in evidence, over objection, important alleged declarations of a co-conspirator after the termination of the alleged conspiracy and not in furtherance thereof.

STATEMENT

Count 1 of a three-count indictment (R. 11–16), filed on January 4, 1943 (R. 3), in the District Court for the Southern District of New York, charged that on or about October 20, 1941, petitioner and one Rose Sookerman,[1] a codefendant, induced and enticed one Elizabeth Johnston[2] to travel in interstate commerce by common carrier from New York City to Miami, Florida, for the purpose of prostitution and debauchery and for other immoral purposes, in violation of Section 3 of the Mann Act (18 U. S. C. 399). Count 2 charged the same defendants with causing the aforesaid

[1] Variously referred to in the record as Pauline Hillson, Betty Lewis, Betty Gordon (R. 49), and Mrs. Rose Kay (R. 715).

[2] Variously referred to in the record as Elizabeth Sorrentino, Joyce Winters, and Joyce Winston (R. 47).

transportation, in violation of Section 2 of the Mann Act (18 U. S. C. 398). The third count charged conspiracy to commit the substantive offenses. Following a trial by jury,[1] petitioner was found guilty on all counts (R. 762). He was sentenced to imprisonment for two years on the first count, and on the other two counts the imposition of sentence was suspended, and he was placed on probation for two years to take effect at the expiration of the sentence on count 1 (R. 767). On appeal, the judgment of conviction was affirmed (R. 868).

The evidence in support of the verdict may be summarized as follows:

Testimony of the victim, Johnston.—Elizabeth Johnston (or Elizabeth Sorrentino, her married name, by which she was most often referred to in this, petitioner's fourth trial) first met petitioner when he picked her up on the street in New York in June 1939. Later the same day he introduced her to Rose Sookerman, his codefendant, and that night all three of them stayed in petitioner's

[1] This was the fourth time that petitioner had been brought to trial. His first trial, at which his codefendant was jointly prosecuted, resulted in a disagreement of the jury (R. 2). In his second trial, he and his codefendant were found guilty by a jury on all counts, and he received prison sentences aggregating 3 years and six months on counts 1 and 3 and a suspended sentence on count 2, but on appeal by petitioner alone his conviction was reversed by a divided court and a new trial granted because of trial errors (R. 2; see *United States v. Krulewitch*, 145 F. 2d 76). His third trial ended in a mistrial (R. 2).

apartment.[4] (R. 49–51.) Johnston told petitioner at the time she met him that she was a prostitute and he told her that Sookerman was also "in the business" (R. 321). During the week after the first meeting Johnston and Sookerman committed acts of prostitution and turned the money over to petitioner (R. 51–52). Petitioner took Johnston to Chicago and endeavored unsuccessfully to place her in a brothel there (R. 51–54). He then paid her fare back to New York where she was met by Sookerman. The two women lived in petitioner's apartment for several months committing numerous acts of prostitution there. Petitioner arranged many of the dates and the women turned the proceeds over to him. (R. 54–62.) Johnston and Sookerman were arrested for practicing prostitution in October 1939, and Johnston was sent to the reformatory (R. 63–64).

Petitioner attempted to secure Johnston's release despite her unwillingness to see him,[5] and after she had finally been paroled to her mother in Canandaigua, New York, in December 1940, he visited her three or four times, telling her mother that he wanted to marry her. In March 1941, she returned to live in petitioner's apart-

[4] At the time of their meeting in 1939 petitioner was about 46 (R. 512), and Johnston was 19 (R. 125). Sookerman was reputedly petitioner's wife and had been living with him at least since 1935 (R. 179, 326, 711, 715).

[5] She testified that he frequently threatened her and that he bothered her every place she moved (R. 292–295).

ment in New York City. Petitioner and Sookerman owned several cider stubes which were actually "fronts" for houses of prostitution, and she went to work there as a waitress and prostitute. Her earnings, averaging $40 or $50 a day, she turned over to him. (R. 64–71, 147–151; cf. R. 531–533, 719–721.)

In early October 1941, petitioner took a trip to Florida (R. 71). When he returned, he told Sookerman and Johnston that he had leased a small hotel, called the El Chico, in Miami, Florida, that "he had paid a man $1,000 * * * for a connection for his girls to work in this place," and that it would be better for them to go down there to "work" (R. 71–72, 422–425). In the latter part of October all three traveled to Miami by train on tickets purchased by petitioner (R. 72–74, 166–167, 319). Petitioner shortly returned to New York and Sookerman and Johnston, pursuant to petitioner's directions, began to practice prostitution in the hotel (R. 74–76, 174–176, 183). Johnston turned over her earnings to Sookerman who gave them to petitioner. When the police began to investigate, Sookerman took Johnston to another hotel for two nights (R. 184–186). In November, the two women were arrested for prostitution and they immediately sent a telegram to petitioner.[*] He came to Miami

[*] Petitioner apparently altered the date of this telegram so as to make it appear that it had been sent earlier for another purpose (R. 404–407, 569, 696–702, 704–710).

and he and Sookerman took Johnston to another house of prostitution. Sookerman collected Johnston's earnings from the house. (R. 76–78, 106–109.) Sookerman and petitioner always handled the financial "end of the business" (R. 305). Johnston became ill and early in December she and Sookerman returned to New York, going straight to petitioner's apartment. After a few hours, Johnston went to her mother's home in Canandaigua and Sookerman returned to Miami. (R. 109.)

About two days later, Johnston was arrested at her mother's house in Canandaigua by an F. B. I. agent, and was taken to Rochester where she remained for a week.[1] During this period she was visited by Sookerman who advised her not to "talk * * * until we get you a lawyer." Sookerman told her to be very careful what she said and added that "It would be better for us two girls to take the blame than Kay [an alias of petitioner] because he couldn't stand it, he couldn't stand to take it." (R. 109–112, 194.) On December 20, Johnston was released on a bond furnished by petitioner.[2] (R. 114).

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[1] An indictment charging a violation of the Mann Act had been filed in the District Court for the Southern District of Florida. Petitioner and Sookerman were also arrested at about the same time as Johnston (R. 80–86, 391–393, 575).

[2] At the time of this arrest Johnston gave an untruthful statement to the F. B. I. completely exonerating petitioner (R. 112–113; Gov. Ex. 5, R. 824–825). Petitioner compli-

After her release, Johnston returned to live with petitioner and Sookerman in petitioner's apartment and she resumed her work in the cider stubes as a prostitute; later, because "everything was so hot," she moved into a separate apartment, and then went to Amsterdam, New York, still practicing prostitution and still handing over her earnings to petitioner (R. 114–118, 269, 279). In February or March 1942, Johnston and Sookerman, at petitioner's direction, wrote some letters, purporting to have been written by them to petitioner during the period the women were in Florida, that is, in October and November 1941[2] (R. 118–121).

Corroborative testimony.—Cora Brown (R. 204–218) and Charles Neville (R. 221–223) testified that in early October 1941 petitioner leased the El Chico Hotel in Miami, Florida, as agent for Pauline Hillson (an alias of Sookerman). Arthur Peacock (R. 235–240) testified that he operated a retail bicycle business in the street floor of the premises occupied by the El Chico Hotel; that petitioner came in on October 1, 1941, and asked if he could rent the upstairs; that peti-

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[illegible] her and said he was sure they could beat the case (R. 115). The original indictment in the District Court for the Southern District of Florida was closed without prosecution on February 27, 1942 (R. 83).

[2] Petitioner introduced these letters in support of his contention that he had sent Johnston to Florida to recover her impaired health (R. 121, 560–565; Def. Ex. OO and XX, R. 810–812, 849–850).

tioner led him to believe he was going to operate it as a house of prostitution; that thereafter Sookerman and Johnston occupied the premises and that their visitors were almost all men. William Davenport (R. 264–266), a Miami police officer, testified that he arrested the two women in November 1941; that Sookerman did most of the talking; that he "asked her what gave her the idea that she could open up a house of prostitution there, and she said she thought things had been taken care of."

John Dolan (R. 325–328) testified that in 1941 he was employed as doorman at an apartment house in which petitioner was a tenant; that Sookerman was living with petitioner; that Johnston came to join them later in the year; that in October 1941, all three left the building together, Johnston saying she was going to Florida; that all three were there again in December.[10]

Mildred Krankewicz (R. 342–352) testified that she had worked as a waitress in one of petitioner's cider stubes; that at petitioner's first trial she testified falsely, at his request; that Johnston had tried to get her to report petitioner to the F. B. I.

Defense testimony.—Petitioner denied any responsibility for the acts of prostitution committed by Johnston and Sookerman (R. 585). He testi-

[10] Petitioner was shown to have manufactured a statement by Dolan to support his contention that the F. B. I. had illegally seized certain papers from his apartment (R. 660–663, 702–704).

fied that he was a reputable advertising man (R. 513–518), and that he fell in love with Johnston shortly after he met her in 1939 and wanted to marry her (R. 521, 529–530, 532). He testified further that he had only known Sookerman for a very short time prior to meeting Johnston (R. 614); that when Sookerman and Johnston were arrested in New York City in October 1939 he was not aware that the charge was prostitution (R. 530, 626–628); that in October 1941 he leased the hotel in Miami for Sookerman, paying money furnished by her, because she wanted to go into the hotel business there (R. 540–547); that he sent Johnston to Florida with Sookerman because Johnston was sick (R. 548–550).

Rebuttal testimony.—There was testimony that Sookerman had been living with petitioner and had been known as his wife as early as 1935 (R. 710–717), and that petitioner was aware of the reason Sookerman and Johnston were arrested in New York in October 1939[11] (R. 721).

[11] In line with petitioner's other attempts to manufacture evidence it may be noted that he filed a motion for a new trial based at least in part upon a false statement induced by petitioner. The grounds were that the court bailiff had instructed the jury during its deliberations on the nature of the verdict to be returned, and that one of the jurors had falsely stated on *voir dire* that she had never been employed by the United States. The bailiff later admitted that his affidavit was false and had been induced by petitioner's promise to take care of him. The other ground was shown to be, under the most charitable construction, completely baseless. (R. 768–823.)

SUMMARY OF ARGUMENT

I

Petitioner was indicted for violations of the Mann Act and for conspiracy to commit the substantive offenses. The sole issue is whether a conversation between the victim, Johnston, and petitioner's co-conspirator, Sookerman, occurring over a month after completion of the illegal transportation, in which Sookerman attempted to persuade Johnston to conceal petitioner's guilt, was admissible in evidence against petitioner. In our opinion the evidence was properly admitted against petitioner because, regardless of the accomplishment of the main object of the conspiracy, the efforts of co-conspirators to conceal each other's participation are implicitly authorized in the original agreement.

We do not question the rule of law that narrative statements made by a conspirator out of the presence of a co-conspirator after the conspiracy has ended, are not admissible as against the co-conspirator. There are, however, some well-established exceptions to the above rule. One exception is that there being an implicit understanding in every conspiracy that the parties thereto will use their efforts to conceal the criminal act after its completion, a conspiracy does not end with the accomplishment of the criminal

offense for the purpose of concealing the crime. Consequently, in such cases, once the conspiracy has been established by proof *aliunde*, the statements of a conspirator made out of the presence of a co-conspirator after the crime has been completed, are admissible as against the co-conspirator for the purpose of showing a suppression of competent evidence in order to conceal the crime or frustrate its prosecution. This has long been the rule in state courts, and the decisions of this Court do not preclude its application in federal courts.

II

Conceding, *arguendo*, that the admission of the Sookerman statement was erroneous, we think the error was harmless, and that it could not have been the cause of any substantial prejudice to petitioner. This evidence was not essential to the Government's case, since the other evidence submitted to the jury overwhelmingly establishes petitioner's guilt. Consequently, the Sookerman statement was merely cumulative. Had Sookerman herself related it to the jury, it might have had considerable influence on them, but since it came from the victim Johnston, who was the Government's principal witness, it was no more than cumulative to the other parts of her story.

ARGUMENT

I

Testimony as to Sookerman's statement to Johnston was admissible against petitioner as the statement of a coconspirator made to further the conspiracy by suppressing evidence of the crime and protecting petitioner from prosecution

In granting the writ of certiorari, this Court limited its review to but one of the ten points raised by the petition. The facts pertinent to that one point may be stated briefly:

The conspiracy count of the indictment charged that petitioner and Sookerman conspired in October 1941 to transport the Johnston woman from New York to Florida in interstate commerce for the purpose of prostitution. The facts set forth in the Statement above indicate that there was abundant independent evidence to show that petitioner and Sookerman did enter into such a conspiracy and did fulfill their object by transporting Johnston to Florida in October 1941 and putting her "to work" in the El Chico Hotel. After all three had returned to New York in December 1941, Johnston was arrested in connection with an investigation of the case and held for a week in Rochester. There she was visited by Sookerman. Over objection, Johnston was permitted to testify to the following conversation with Sookerman during this visit (R. 111–112):

> She asked me she says, "You didn't talk yet?" And I says, "No." And she says, "Well, don't," she says, "until we get you

> a lawyer." And then she says, "Be very careful what you say." And I can't put in exact words. But she said, "It would be better for us two girls to take the blame than Kay because he couldn't stand it, he couldn't stand to take it."

Counsel for petitioner objected[12] on the ground that the conspiracy had terminated, and that the acts and declarations of the co-conspirators subsequent to the termination were not binding on each other. The Government argued that Sookerman's action was taken in furtherance of the conspiracy. The trial court, without clearly expressing its reason,[13] overruled the objection and admitted the conversation (R. 110–112). The Court of Appeals for the Second Circuit, in affirming this action of the trial court, said, "We think that implicit in a conspiracy to violate the law is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated. Thus the conspiracy continues at least for purposes of concealment, even after its primary aims have been accomplished. The statements of the co-conspirator here were made in an effort to

[12] Counsel had previously objected to mention of this conversation in the prosecutor's opening statement (R. 34–35).

[13] Some language used by the trial court indicates that it may perhaps have been of the opinion that the acts and declarations of conspirators, even after the termination of the scheme, are admissible against co-conspirators as evidence of intent (R. 111). The Court of Appeals noted that "it might conceivably be held that this evidence was admissible" for this purpose (R. 862).

protect the appellant by concealing his role in the conspiracy" (R. 862–863):

The disputed evidence thus consists of testimony as to declarations or conduct of Sookerman obviously intended to frustrate prosecution of the crimes charged in the indictment against both Sookerman and the petitioner. In fact, the declarations of Sookerman seem to be particularly directed at shielding petitioner from prosecution, for Sookerman stated that "It would be better for us two girls to take the blame than Kay [the petitioner] because he couldn't stand it, he couldn't stand to take it." In other words, Sookerman's principal purpose in making these declarations to Johnston appears to have been to protect petitioner from prosecution by persuading Johnston not to give evidence which would implicate petitioner.

It is well established that suppression of evidence by a defendant may itself be introduced as evidence of guilt. *Wilson* v. *United States,* 162 U. S. 613, 621; *United States* v. *Freundlich,* 95 F. 2d 376, 378–379 (C. A. 2); 2 Wigmore on *Evidence* (3d ed. 1940), § 278. Thus, testimony that the petitioner had attempted to persuade Johnston not to give evidence against him would be admissible as evidence of his guilt. Similarly, testimony of such attempted suppression of evidence by an agent of the petitioner would be admissible against him. So also, testimony of an attempt to suppress evidence by a conspirator is admis-

sible against a co-conspirator for the same evidentiary purpose and result as if the latter had personally attempted to suppress the evidence.

The rule that the acts and declarations of one conspirator made during the existence of the conspiracy are binding on the others, has its roots in the law of agency. *Van Riper* v. *United States,* 13 F. 2d 961, 967 (C. A. 2), certiorari denied, *sub nom. Akerson* v. *United States,* 273 U. S. 702; 4 Wigmore, *Evidence* (3d ed. 1940), § 1079. A conspiracy is a partnership in crime, and the acts and declarations of each conspirator in furtherance of the aims of the partnership are imputed to each of his fellows. *Fiswick* v. *United States,* 329 U. S. 211, 216; *Pinkerton* v. *United States,* 328 U. S. 640, 646–647; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253.

For the purposes of this case, it must be assumed that there was independent evidence as to the existence of a conspiracy between petitioner and Sookerman as charged in the indictment, and in fact there was such evidence. Thus, there is involved here no question as to the admissibility generally of co-conspirators' statements against each other. Accordingly, if Sookerman's statements to Johnston were made during and in furtherance of the conspiracy, they are admissible against the petitioner. Petitioner's objection to the admissibility of the testimony is that the conspiracy had terminated prior to Sookerman's statements to Johnston, and that testimony as to

such statements is therefore not admissible against petitioner as evidence of the declarations of a co-conspirator.

It is our position that the testimony was admissible in that Sookerman's statements must be regarded as having been made during and in furtherance of the conspiracy between Sookerman and the petitioner. Every criminal partnership or conspiracy embraces within its purposes the avoidance of prosecution and punishment for the crime which is the primary purpose of the conspiracy. It is a natural and intended aspect of every conspiracy to commit a crime that the conspirators, both before and after the completion of the crime, will conceal the parts played by each in its commission. There is an understanding, implicit or otherwise, that the collaboration of the conspirators extends to preventing the detection of the crime and its successful prosecution.

The decision below is not in conflict with *Fiswick* v. *United States*, 329 U. S. 211, and other cases relied upon by the petitioner which involved confessions of conspirators made to police officers after completion of the crime, and in which it was evident that the confessions were designed to frustate the conspiracy rather than to further it. Likewise inapposite are the cases which hold inadmissible statements made by persons who had withdrawn from the conspiracy, as well as those cases in which the statements were mere narra-

tions of past events, as distinguished from statements made for the purpose of furthering the conspiracy. In fact, the precise question here involved has had little consideration by the Federal courts. The decision below seems to represent the only direct and thorough analysis of the point.

Logan v. *United States*, 144 U. S. 263, 309, did not deal with the present question, despite the allusion in the Court's opinion to the suggestion of government counsel that the conspiracy included an attempt to manufacture evidence to shield one of the conspirators. It is entirely clear (at p. 274) that the statements held to be inadmissible were mere narrative statements by some of the conspirators and were in no sense made in furtherance of the conspiracy, since they tended to implicate rather than to shield the others. In *Brown* v. *United States*, 150 U. S. 93, although the facts suggest that the Government could have made the same contention as in the present case, neither the opinion nor the Government's brief indicates that the contention was made. In fact, the opinion indicates that the real holding of the case was that the existence of the conspiracy could not be established solely by evidence of declarations of alleged conspirators. Of course, it is well established that the existence of a conspiracy must be supported by other evidence before the declarations of an alleged conspirator may be admitted against an alleged co-conspirator. *Glasser*

v. *United States*, 315 U. S. 60, 74. *In Fiswick* v. *United States*, *supra*, this Court appeared to leave open the precise question here involved. Thus (at p. 217): "If as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the Government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator." This is far from holding that statements made by a conspirator in an attempt to suppress evidence may not be received against the co-conspirator who would be protected by such suppression.

Similarly, the lower Federal courts have had little occasion to consider the precise question. The court below indicated that there was an implication contrary to its view in *Bryan* v. *United States*, 17 F. 2d 741, 742 (C. A. 5). In that case, however, it is not clear whether it was urged or considered that the criminal conspiracy included in its purposes the prevention of detection and prosecution. In fact, it may be that the real holding of the case is that the person whose declarations were held inadmissible had not been shown *aliunde* to be a party to the conspiracy. *Galatas* v. *United States*, 80 F. 2d 15, 23 (C. A. 8), certiorari denied, 297 U. S. 711, is not in point because it merely held that the acts of a conspirator were admissible against himself regard-

less of whether the conspiracy had ended. Thus, it appears that the court below is the only Federal court which has considered whether the action of a conspirator in attempting to suppress evidence against a co-conspirator, after completion of the crime which was the primary object of the conspiracy, is attributable to the latter.

It is highly significant that in general the Federal courts have not taken the position that a conspiracy necessarily terminates with the completion of the crime which was its primary purpose. Thus, in *Skelly* v. *United States*, 76 F. 2d 483 (C. A. 10), certiorari denied, 295 U. S. 757, it was said that a kidnapping conspiracy embraced the purposes of avoiding detection, apprehension, trial, and punishment, as well as the purpose of obtaining the ransom money. In that case, it was held that participation in the use of the ransom money in such a manner as to avoid detection made the actors parties to the kidnapping conspiracy, although the transportation of the victim in interstate commerce had been completed. *Low Moy* v. *United States*, 237 Fed. 50 (C. A. 8) closely resembles the instant case. There the indictment charged a conspiracy to bring Chinese illegally into this country; the Court of Appeals upheld the admission of evidence as to the acts of some of the conspirators, subsequent to the entry, in transporting the Chinese into the interior and concealing their identity. The court stated (p. 52):

> It is also urged that the conspiracy was at an end the instant the Chinese whose illegal entry was procured and facilitated were brought across the international boundary, and therefore the trial court erred in admitting in evidence the subsequent acts and declarations of one conspirator against the others. This is too narrow a view of the crime charged. Successfully to consummate the unlawful introduction of the prohibited aliens required more than the mere bringing of them across the line. It was necessary to evade the immigration officials by transporting them into the interior and concealing their identity. The subsequent assistance by defendants to that end may well have been an essential part of the unlawful project.

See also *Murray* v. *United States*, 10 F. 2d 409, 411 (C. A. 7), certiorari denied, 271 U. S. 673. *Heard* v. *United States*, 255 Fed. 829, 834 (C. A. 8), is apparently adverse to our position here, since it held inadmissible against a conspirator a declaration made by one co-conspirator to another, after the commission of the crime, that he would give the defendant a share of the loot. Not only is this decision inconsistent with the theory of *Skelly* v. *United States*, *supra*, but it illustrates perfectly the realism of the decision below in the instant case. Moreover, the *Heard* decision is squarely opposed by the many decisions of the

state courts which have considered the precise problem there involved.[14]

Since, as this Court has recently noted,[15] the rules of evidence in criminal cases have been largely developed in the state courts, it is not surprising to find that the problem of the instant case has been repeatedly dealt with in many state court decisions. The general and long-established rule in the state courts is that a criminal conspiracy inherently includes in its purpose the avoidance of detection and the frustration of prosecution. In *Commonwealth* v. *Smith*, 151 Mass. 491, evidence relating to the removal of furniture taking place after the crime of burning a house had been completed was admitted as against a co-conspirator taking no part in the moving; on the ground that the acts done were for the purpose of shielding the conspirators from the consequence of their crime. The Supreme Judicial Court of Massachusetts stated (p. 496):

> * * * Even if those declarations or conversations were subsequent to the burning, they were still made during the pen-

[14] See *People* v. *Storrs*, 207 N. Y. 147, 155; *Commonwealth* v. *Scott*, 123 Mass. 222, 235; *Commonwealth* v. *Stuart*, 207 Mass. 563, 567–568; *State* v. *Garrett*, 71 Ore. 298, 305–307; *Rawlings* v. *State*, 163 Ga. 406, 421–425; *Byrd* v. *State*, 68 Ga. 661; *Baker* v. *State*, 17 Ga. App. 279; *State* v. *Pettit*, 77 Wash. 67, 68; *Baker* v. *State*, 80 Wis. 416, 422; *O'Neal* v. *State*, 14 Tex. App. 582, 589; *State* v. *Stevenson*, 26 Mont. 332.

[15] *Michelson* v. *United States*, No. 23, this Term, decided December 20, 1948, slip opinion, p. 16.

> dency of the criminal enterprise. They were not recitals of past occurrences, but were connected with acts done evidently to shield the conspirators from the consequences of their crime.

In *People* v. *Mol*, 137 Mich. 692, 707, a conversation between two conspirators after the substantive crime was committed was admitted as against a third who was not present, on the ground that the conversation related to action taken for the avowed purpose of avoiding an exposure of the crime. In *Allen* v. *Commonwealth*, 176 Ky. 475, the trial court had admitted evidence against one conspirator that he had attempted to frustrate prosecution by bribing a witness. On appeal, the Court of Appeals of Kentucky not only approved its admission for that purpose, but also reproved the trial court for not admitting it against the co-conspirators. In so doing, the court stated the applicable rule as follows (p. 485):

> * * * While it is true that statements of conspirators made after the commission of the criminal act of the conspiracy are ordinarily not competent evidence against their co-conspirators, yet where the object of the conspiracy had not been fully attained by the criminal act, statements made by any of the conspirators, with reference to the distribution of the fruits or profits of the criminal act which was but an incident in the conspiracy to procure the profits, are competent evidence against all of

the conspirators, as are also statements made after the commission of a crime in an effort to prevent the discovery of the crime or the identity of those connected with its perpetration.

Other State cases in accord are: *Hooper* v. *State*, 187 Ark. 88, 92; *State* v. *Gauthier*, 113 Ore. 297, 307; *State* v. *Garrett*, 71 Ore. 298; *State* v. *Emory*, 116 Kan. 381, 384; *State* v. *Richmond*, 96 Kan. 600, 603; *Lanier* v. *State*, 187 Ga. 534, 542; *Carter* v. *State*, 106 Ga. 372, 376; *Smith* v. *State*, 47 Ga. App. 797, 803; *Watson* v. *State*, 166 Miss. 194, 213; *Baldwin* v. *State*, 46 Fla. 115, 120; *State* v. *Strait*, 279 S. W. (Mo.) 109. The rule of these and analogous cases is aptly summarized in Underhill's *Criminal Evidence* (4th ed.), § 779 (pp. 1418–1420)[16] and 2 Wharton's *Criminal Evidence* (11th ed.), § 715 (pp. 1205–1206).[17]

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[16] Section 779 of Underhill reads as follows:

"As a general rule, subject to exceptions hereinafter stated, the acts and declarations of a conspirator done or made out of the presence or hearing of a coconspirator after the termination of the conspiracy or commission of the crime are not admissible against said coconspirator, unless he acted in an incriminatory manner in connection with such declarations; but the acts and declarations of a conspirator done or made in the presence or hearing of a coconspirator after the termination of the conspiracy or commission of the crime and concerning the conspiracy or the crime committed are admissible against said coconspirator, if he expressly or impliedly acquiesced in the declarations. Acts and declarations of a conspirator after the commission of the crime, though done or made out of the presence or hearing of a coconspirator, are admis-

(Footnotes 16 and 17 continued on next page)

To summarize: the decision of the court below holds that an implicit purpose of every criminal conspiracy is to thwart detection and prosecution of the crime which is the primary purpose of the

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sible against the coconspirator in the following instances: Res gestae of the crime; leaving scene of crime; concealing crime; flight or concealment of person; concealing or suppressing evidence of crime; taking means to prevent or defeat prosecution; attempting to settle insurance claim after arson to defraud insurer; possession, division and disposition of fruits of crime; possession of weapon or instrument with which crime was committed; possession of clothing connected with crime; and where the act or declaration was done or made prior to or during commission of another crime within the conspiracy."

[17] § 715 of Wharton contains the following statement:

"The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment. The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission; the conspiracy to commit the crime devolves after the commission thereof into a conspiracy to avoid arrest, and implication. It has also been held that a conspiracy to commit a crime endures for the purpose of escape, the concealment of evidence, or the defeat or prevention of prosecution. It has been held that evidence of a conversation between city officials who had been parties to a conspiracy to secure a city contract by bribery, after the abandonment of the conspiracy, was admissible upon the trial of one of them for the offense, where it related to the election of one of them to avoid exposure. And where the defendant was charged with being an accessory after the fact, the conspiracy was not ended so long as the defendant concealed the crime and protected the principals."

conspiracy, and that evidence as to the conduct or declarations of one conspirator in suppressing evidence of the crime is admissible against co-conspirators. This result is supported by logic and common sense. It is in accord with the rule developed and adhered to by the state courts in many cases. Since Sookerman's statement to Johnston had as its obvious purpose the inducement of Johnston not to give evidence against the petitioner, Sookerman's co-conspirator, Johnston's testimony as to that statement was clearly admissible against petitioner.

II

Even if the admission of Sookerman's statements was erroneous, the error was harmless

Even assuming that the admission of Sookerman's statement was erroneous, we submit that petitioner's guilt was overwhelmingly established by the other evidence as summarized in the Statement, *supra*, pp. 3–9. There was evidence that Sookerman had lived with petitioner for years as his wife, that after Johnston appeared in 1939 the two women lived together with him, practiced prostitution in his apartment and in the cider stubes owned by him, and turned the proceeds over to him. Prior to the Florida trip in October 1941, petitioner told Sookerman in Johnston's presence that he had leased a hotel in Miami and had paid $1,000 so

that they could "work" there without molestation. Sookerman, of course, accompanied petitioner and Johnston to Florida. After petitioner's return to New York, Sookerman took charge of the financial "end of the business," turning the proceeds over to petitioner. She expressed surprise when told by the Miami police that they could not continue, saying that she thought things had been arranged. She continued to look after petitioner's interests, however, by placing Johnston in an established house, from which she collected Johnston's income. After the return to New York, we find the two women again living in petitioner's apartment and "working" in the cider stubes. And in early 1942, both Sookerman and Johnston, at petitioner's direction, wrote pre-dated letters designed for use in case of a Mann Act prosecution.

Further, Johnston's testimony as to Sookerman's efforts to conceal petitioner's guilt added no new element to the Government's case. Its effect was to show an attempt by the conspirators, Sookerman and petitioner, to suppress evidence. But the Government introduced other evidence in abundance on this point. See footnotes 6, 8, 9, 10 and 11, *supra*. This particular bit of testimony was not necessary to the Government's contention that petitioner's guilt was indicated by his attempts to suppress or manufacture evidence. It was simply cumulative in nature.

Under the "harmless error" statute, Section

269 of the Judicial Code, as amended,[18] an appellate court may not reverse a judgment of conviction for errors "which do not affect the substantial rights of the parties." Construing this statute in *Kotteakos* v. *United States*, 328 U. S. 750, 764, this Court stated that, in determining whether error should result in reversal, the question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. * * *. If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * *." And, dealing more specifically with the particular type of situation presented by the present case this Court said, 328 U. S. at 763:

> * * * Errors of this sort in criminal causes conceivably may be altogether harmless in the face of other clear evidence, although the same error might turn scales otherwise level, as constantly appears in the application of the policy of § 269 to questions of the admission of cumulative evidence.[19]

We submit that this is certainly not a case in which the scales, "otherwise level," were tipped

[18] 28 U. S. C. 391; see also Rule 52 (a), F. R. Crim. P.

[19] See also footnote 17 to the text, citing *Lucks* v. *United States*, 190 F. 2d 908 (C. A. 5); *United States* v. *Goldsmith*, 91 F. 2d 983, 986 (C. A. 2), certiorari denied, 302 U. S. 718; and *Beech* v. *United States*, 19 F. 2d 739, 743 (C. A. 8), certiorari denied, 276 U. S. 623. For some other particularly apposite cases in which cumulative evidence was held harmless, even though erroneously admitted, see *United*

against petitioner by the admission of the evidence of which he complains. The evidence was not essential to the Government's case, for it had already been thoroughly established by other evidence that he had made attempts to conceal his guilt. Thus, it was merely cumulative. And there was nothing unique about this particular bit of evidence. Had the jury heard it from Sookernian herself, it might have stood out in the minds of the jurors. It came, however, from the victim, Johnston, whom the Government used to present the general picture of petitioner's wrong-doing. It added nothing to Johnston's story. It placed no stamp of credibility upon her testimony. If the jury chose to believe her, which they obviously did, there was much in her story, aside from the Rochester conversation with Sookerman, to convince them of petitioner's guilt and of Sookerman's full knowledge of, and participation in, his offenses.

Johnston, disreputable though she was,[29] was strongly corroborated on essential points by other

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States v. *Graves*, 122 F. 2d 87, 91 (C. A. 2), certiorari denied, 314 U. S. 670; *Hilliard* v. *United States*, 121 F. 2d 992, 999 (C. A. 4), certiorari denied, 314 U. S. 627; *United States* v. *Bob*, 106 F. 2d 37, 40 (C. A. 2), certiorari denied, 308 U. S. 589; *Osborn* v. *United States*, 17 F. 2d 246, 250 (C. A. 9), certiorari denied, 274 U. S. 751; *MacDaniel* v. *United States*, 294 Fed. 769, 770–771 (C. A. 6), certiorari denied, 264 U. S. 593.

[29] See *United States* v. *Krulewitch*, 145 F. 2d 76, 78 (C. A. 2).

independent witnesses.[21] Petitioner, on the other hand, relying chiefly on his own testimony for exoneration, was shown to have made numerous statements at earlier proceedings conflicting with his testimony at this trial (see, e. g., R. 605–606, 611–612, 622, 627–628, 632, 646–650, 688). Also, the jury in this case could have been influenced by evidence that at petitioner's first trial he had induced a witness to commit perjury (R. 340–352). We think it manifest that under the circumstances the evidence of Sookerman's attempt to shield petitioner can have had no appreciable influence upon the jury's decision.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

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[21] See the Statement (*supra*, pp. 7–8).

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